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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. SLIM VALENTINE MANAI, Defendant and Appellant.	A120316 (City & County of San Francisco Super. Ct. No. 199518)

Slim Valentine Manai was convicted by jury of forcible oral copulation, assault with a deadly weapon, sexual battery, and criminal threats against two victims. Manai contended that the sexual activity was consensual and that the allegations that he degraded the victims and used force and violence were fabrications. He argues the trial court erred by: (1) admitting evidence that he had committed a prior sexual assault in Paris in 1996; (2) excluding evidence that the complaining witnesses had an intimate relationship; (3) failing to instruct the jury that it should consider promises of immunity or leniency when evaluating the witnesses' testimony; (4) failing to instruct the jury on the corpus delicti rule; (5) failing to remove a juror for cause due to misconduct during voir dire and during trial; and (6) imposing excessive restitution and parole revocation fines. We agree that the restitution and parole revocation fines must be reduced, but otherwise reject Manai's challenges to his conviction and affirm.

I. BACKGROUND

On August 28, 2006, Manai was charged by information with first degree burglary of a home occupied by Claudia M. and Suzy T. (Claudia and Suzy)[1] with intent to: commit oral copulation (Pen. Code, § 459; count 1);[2] oral copulation with Suzy against her will (§ 288a, subd. (c)(2)(A); count 2); sexual battery of Suzy using physical restraint (§ 243.4, subd. (a); count 3); assault with a deadly weapon, a corkscrew, of Suzy (§ 245, subd. (a)(1); count 4); criminal threat of Suzy (§ 422; count 5); oral copulation with Claudia against her will (§ 288a, subd. (c)(2); count 6); and assault with a deadly weapon, a corkscrew, of Claudia (§ 245, subd. (a)(1); count 7). It was alleged that Manai personally used a deadly and dangerous weapon, a corkscrew, when he committed the burglary, sexual battery, and criminal threat counts (counts 1, 3 and 5; § 12022, subd. (b)(1)), and when he committed oral copulation counts (counts 2 and 6; § 12022.3, subd. (a)), rendering the latter crimes serious felonies (§ 1192.7, subd. (c)(23)). On the oral copulation counts, it was alleged that Manai committed a first degree burglary with the intent to commit the sexual offense (§ 667.61, subd. (d)(4)), and that he had been previously convicted of rape in France in November 1999 (§ 667.61, subd. (d)(1)). Each of the latter allegations triggered a minimum sentence of 25 years to life (§ 667.61, subds. (a), (c)(7)). As to all counts, it was alleged that Manai had prior convictions for rape, kidnapping, and burglary in his native France in November 1999 within the meaning of section 667, subdivisions (a), (d) and (e), and section 1170.12, subdivisions (b) and (c).

Jury selection first began before Judge Miller on October 23, 2006. On October 26, 2006, after a jury was sworn, but before the presentation of evidence, the court declared a mistrial. Jury selection for a retrial began immediately and the presentation of evidence took place in November 2006. On November 14, 2006, another

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[1] Because of the nature of the offenses, the last names of the complaining witnesses were not disclosed on the information or at trial. Accordingly, we refer to these witnesses by their first names only.

[2] Unless otherwise noted, all further statutory references are to the Penal Code.

mistrial resulted after the jury was unable to reach a unanimous verdict. Jury selection began for a third time on January 10, 2007, before Judge Cynthia Ming-Mei Lee. The following evidence was presented.[3]

The Prosecution Case

On Thursday, March 2, 2006, Suzy and Claudia went to Place Pigalle, a neighborhood bar in San Francisco, arriving at about 10:00 or 10:30 p.m.[4] They socialized with friends at the bar, including Claudia's neighbors Bobby Rivera and Freddy Fuentes. Manai approached Suzy and introduced himself as Valentine. Suzy testified that she, Claudia, Rivera, and Fuentes decided to go to Claudia's apartment to continue to party.[5] Suzy invited Manai to come along because she felt sorry for him.[6]

When the five arrived at Claudia's apartment, they drank whiskey and used cocaine, which Rivera and Fuentes had brought with them. Claudia testified that Suzy, Manai, Rivera, and Fuentes were all intoxicated. Sometime between 12:30 and 1:00 a.m., Claudia excused herself to go to sleep because she had to work the next day. About an hour later, Suzy, who planned to stay overnight in Claudia's apartment, said she needed to go to bed because she also needed to work the next day. Rivera, Fuentes, and Manai left the apartment together and walked back to the bar. Rivera invited Manai to go back to the bar with him and Fuentes, but Manai said he was going to take a cab home. Rivera and Fuentes entered the bar at about 1:45 a.m. When they left the bar at 2:00 a.m., Manai was gone.

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[3] Manai does not challenge the sufficiency of the evidence to support his convictions. We discuss the evidence in some detail only to the extent necessary to address Manai's other arguments.

[4] On cross-examination, Claudia testified that they arrived at the bar at 8:30 p.m.

[5] Claudia testified that she told Suzy they had to leave because she had to get up early and Rivera and Fuentes, Claudia's neighbors, decided to walk with them; Suzy was still talking to Manai, so they waited for her.

[6] Rivera testified that he and Fuentes had met Manai earlier when they were outside the bar smoking, and when they saw him as they were leaving the bar they invited him to come along to Claudia's apartment.

About 10 minutes after the three men had left the apartment, Suzy heard a knock on the door. She looked out the window and saw Manai standing outside the door in the rain.[7] She opened the door and he asked if he had left his cell phone and keys in the apartment. She saw the phone on a table by the door and turned around to look for the keys. Because of the rain, she let Manai inside.

"[I]n a matter of seconds [Manai] had his arm around my neck, and the other hand . . . was holding a corkscrew to my neck." He was pressing "[p]retty hard" and "it was piercing into [her] skin." Manai then grabbed her arm and turned her around to face him. He told her to shut up and not to make any noise if she wanted to live. Suzy smiled because she thought he was just rough housing in play. When she asked if he was joking, he hit her at least three times on the top and side of her head. Manai was not slurring his words and he did not seem intoxicated. Suzy also did not feel intoxicated at that point.

Manai told Suzy to get on her hands and knees and act like a dog. She looked up at him in shock, and "he had these cold eyes, like he had so much hate in him." He told her not to look at him. Suzy got on her hands and knees and Manai hit her on the top of her head "really hard" three or four times with a closed fist. She thought she was going to pass out. Manai said he was going to get what he wanted and then leave. He grabbed Suzy by the hair and dragged her to the kitchen as she crawled along with him. When she said, " 'How could you do this?' " he punched her in the head, told her to shut up, ordered her not to look at him, and said she should be "a good doggie." Also, when she called him "Valentine," he told her not to because it was not his real name. Manai told Suzy to suck on his finger "and do it good." As she did so, he moaned and seemed to be enjoying it. He then told Suzy to get up and kiss him, which she did.

Manai said he wanted to go into Claudia's bedroom. Suzy panicked because "I was afraid she was going to scream or—and I was afraid that he was gonna hurt her." Manai told Suzy to shut up and hit her on the head. He held Suzy with the corkscrew to

[7] Claudia's apartment is a street-level one bedroom apartment with a front door that opens onto the street.

her neck, went into the bedroom, and told Suzy to get on her hands and knees. Suzy climbed on the bed and rubbed Claudia's arm to wake her up as Manai stood next to Claudia. Manai then put his hand over Claudia's mouth and held the corkscrew to her neck or temple. When Claudia woke up and asked what was going on, Manai told her to shut up, hit her on the head with a closed fist really hard, and told her not to make any noise. He said he was going to rearrange her face if she fought him, and he was going to get what he wanted and then leave. Manai told Claudia to get on her hands and knees and act like a dog. Claudia got on her hands and knees on the bed next to Suzy.

Claudia testified that when she woke up, she felt a sharp object by her head and saw someone standing to her left. When she asked, "Who is that?" Manai punched her "pretty hard" in the mouth and said not to look at him. She started to get up, but Manai pushed her back onto the bed and said, " 'Do you want your face rearranged?' " Manai then put his left fingers in her mouth and felt her breasts under her shirt while telling her not to look at him. Claudia asked, "What are you doing?" and he punched her in the mouth again and told her not to look at him. Claudia tried to get off the bed and she felt Manai push her to the floor, where she landed on her hands and knees. Manai kicked her in the ribs and punched her in the left back. Suzy said, "Don't hurt her," and Manai hit Suzy in the face. Claudia noticed Manai had a corkscrew in his hand and did not recognize it as something from her household. Manai was not slurring his speech or stumbling during the incident.

Claudia testified that they left the bedroom because she told Manai she had to go to the bathroom. Manai grabbed them by their hair, pulling Suzy off the bed, and took them to the bathroom as they crawled along with him. He kept telling them not to look at him. In the bathroom, Claudia was not able to relieve herself. Manai told both women to take off their clothes. Claudia had difficulty taking off her shirt, which was a karate top with ties in a knot.

Suzy stripped naked and Manai made her give him oral sex. Suzy was delayed by multiple buttons on her shirt and he punched her and told her to hurry up. When she got all her clothes off, Manai told her to stand in front of him and he caressed her breasts and

moved his hand toward her pubic area while moaning, breathing heavily and saying things like, "Oh, yeah, that's nice." Manai told her to turn around and he caressed her waist and buttocks, making the same sounds. Manai then told her to get on her hands and knees and suck on his penis and "do it good." Suzy orally copulated Manai for about one minute while he moaned, said it was good, and called Suzy a "good doggie." Manai then told her to stop, and directed Claudia to take her clothes off. Claudia also had a hard time with her top and Manai told her to hurry up while continuously punching her in the head. He told Claudia to suck on his penis, which she did while on her knees next to Suzy, who was also on her knees. Manai was breathing very hard while she did so, and he still had his hand in Claudia's hair. He then pulled Suzy to her feet and told her to kiss him. Then he moved Claudia toward his penis and made her perform oral sex on him. At first, Claudia's mouth was so dry that she could not do it and Manai hit her on the back of the head with a closed fist and told her, " 'Do it right.' " Then she put her mouth on his penis because she was afraid. She was on her hands and knees on the floor and Manai was standing and kissing Suzy.

Claudia bit down on Manai's penis very hard. He screamed and pulled back, and Claudia stood up and started hitting him as hard as she could, smothering his face with her hands. She told Suzy to hit Manai as well because she could not see Manai's corkscrew. Suzy tried, but Manai was pulling her head down by her hair so she couldn't look up. Manai was also hitting back and they were all screaming. Manai said, " 'Let me go. I want to leave.' " They let him go and he fell back in the hallway, hitting his head against the wall, and ran out the front door. Claudia testified that, while they were fighting, she felt Manai's hand grab the left side of her hair and slam her head against the wall. She lost her vision for a second or two because of the blow. The next thing she remembered, Manai was in the hallway and he said, " 'I leave now,' " as he pulled up his pants.

Claudia slammed shut the door to the bathroom. Suzy was on the floor, crying hysterically, and Claudia asked her to help move a bathroom dresser to block the bathroom door, which they did. Suzy noticed her jacket was in the bathroom, so she took

a cell phone out of the pocket and called 911. She made the call about two to five minutes after the incident occurred. The cell phone recorded that the call was made at 2:03 a.m.

A recording of the 911 call was played for the jury. Suzy provided the address and told the operator, "A gentleman just tried to rape me and my friend and we fought him and he ran out." When the operator asked if he had a weapon, she said, "Yes, he had a corkscrew. He threatened us that he'll kill us with it." She said they had met the man that night at a bar, he had come over with some of their friends, and he introduced himself as Valentine but later said that was not his real name. As she provided this information, Suzy repeatedly broke down crying, had trouble breathing, asked the operator, "Can you please hurry up?" and said, "I'm going to die. Okay. Okay. Okay." Claudia then got on the phone. She was distraught and asked the operator, "Could you please send the SWAT team or something?"

When told that officers were at the apartment, Claudia and Suzy pushed the dresser from the door and ran down the hallway to the front door. Claudia testified, "When we opened the door, we started just being hysterical. Like Suzy fell on the floor screaming and shaking and[] . . . I was just shaking. All I could feel was cold. And I [was] holding my head, because I had been hurt really bad on the side of my head." Suzy testified, "I remember the officers were standing up and I was sitting down, and I asked if they could sit next to me, because I had a really hard time with myself being sat down and someone being above me standing, because that was what was going on through most of the assault."

San Francisco police officer Eric Mahoney responded to the 911 call with another officer and arrived at the apartment at about 2:05 a.m. After knocking for two to three minutes, the door opened and two women came out. "[O]ne of them grabbed me in a bear hug and the other one grabbed my partner in a bear hug." The seemed very scared and they were crying and breathing very heavily, as if hyperventilating. After a few seconds, they went inside and Mahoney tried to separate the women to calm them down and try to find out what happened. It was difficult because they were clinging to each

other and crying. After about five minutes in the bedroom, he brought Claudia back into the living room and she and Suzy began crying again and hugging each other. Mahoney did not notice any signs of intoxication in either woman. They provided an account of the incident and were seen by paramedics.

Mahoney took the women to San Francisco General Hospital's Trauma Recovery Center. Jessica Thayer, a physician's assistant and trained sexual assault response forensic examiner, examined each of them separately beginning at about 4:00 a.m. Inspector Sidney Laws of the San Francisco Police Department sexual assault detail was present during the verbal portions of the examinations, which she recorded. Thayer testified that Suzy was alert and oriented but tearful and upset. Laws testified that Suzy was "very emotionally upset." Both testified that Suzy did not appear to be under the influence of alcohol or drugs. Thayer's physical examination of Suzy revealed tenderness to the back of her head, some scratches on her neck, and some redness and tenderness on the back of her right arm. The scratches on her neck were very thin, as if "a sharp object had brushed across the surface of her skin" and seemed fresh. Thayer opined that the injuries were consistent with Suzy's description of the incident. Photographs taken at the hospital on March 3, 2006, showed a scratch right below her neck, a scratch on the side of her neck, and "fingerprint" bruises or marks on her arm.

Thayer and Laws testified that Claudia was very angry and crying when interviewed. She had no visible signs of intoxication. Thayer's physical examination of Claudia revealed some bruising and tenderness on her left temple, tenderness to her right jaw, tenderness to her midline back, redness and tenderness on the back of her right arm, and a small abrasion on her right knee. These injuries were consistent with Claudia's description of the incident. Thayer took photographs of Claudia on March 3 that showed scratches on neck and redness on her arm, but did not show the bruising on her temple or redness on her back. "[O]ften the photographs don't reflect what we see." Also, "bruising can occur over the next several days as the blood leaks out of the damaged vessels." Photographs of Claudia taken on March 6, 2006, showed a bruise, scrape and swelling on her left knee, which Claudia testified was caused by Manai's dragging her on

the floor; bruising on her right knee; a bruise on her back, which she testified was probably caused by Manai's punching her on the back; a bruise on her rib, which she testified was caused by Manai's kicking her in the ribs; a cut on her left ring finger, which she testified was probably caused when she hit Manai.

In the interviews with Laws, Claudia and Suzy initially denied using cocaine, but later admitted cocaine use when specifically asked by the inspector. Before Suzy testified at the earlier November 2006 trial, the prosecutor told her that she had no intention of prosecuting her for any drug use she admitted during her testimony. Claudia had not been told that she would not be prosecuted for consuming drugs on March 3, 2006, but the prosecutor told her it was unlikely she would be prosecuted.

Earlier, while at the bar, Manai gave Suzie his cell phone number, which she entered on her cell phone "[j]ust to be friendly." Suzy and Claudia gave Laws the number. Laws dialed the number, but it went to voice mail. Using a search warrant, Laws determined that the number was registered to Ali Rad. On March 6, 2006, Laws called another number associated with Rad, reached him, and told him she needed to speak to Manai. Rad agreed to give Manai her number. Laws called Rad again later in the day and Rad asked if it was about a fight with two girls. About a half hour later, Manai called and spoke to Laws. At about 6:00 p.m., Manai came to the police department voluntarily. He was placed under arrest almost immediately and photographs were taken of his penis, which showed bruising.

Prior Sexual Assault Evidence

Veronique P. (Veronique) testified that on June 29, 1996, at about 1:00 a.m., she entered her apartment building and was climbing an internal staircase when she realized people were behind her. As she approached her door, someone put his arm around her throat and shoulders, held a knife blade to her neck, and told her to open the door and enter the apartment. She later got a good look at this man, whom she identified in court as Manai.

Manai and another man, Jouaneix, entered the apartment with Veronique. Soon after entering, they told Veronique to go into one of the bedrooms. Manai told her,

"Watch out or else." At Manai's direction, Jouaneix searched Veronique's bag, found 600 francs and an ATM card, got Veronique's PIN number, and left to take money from her account.

Manai told Veronique to lie face down on the bed. He took rope from the apartment, tied her hands behind her back, and put a towel over her head. He then searched through the apartment, put some of her belongings in a bag. He then asked Veronique to suck his penis. She did not respond. He said, "I'm waiting. I'm waiting. I'm waiting," with an increasingly agitated and mean voice, and she said, "I would prefer not." He said, " '[Y]ou are really disappointing me.' " He told her to keep her eyes closed and then grabbed her by the clothing near her neck and shoulder. She fell to the floor and he dragged her until she was able to get onto her feet and then pulled her into the living room and over to the sofa. Manai sat on the sofa, told Veronique to get on her knees, pulled down his clothes, and pulled her face toward his penis. As she orally copulated him, Manai said her performance was not that great and he told her to swallow his semen. After he ejaculated, Veronique spit out his semen and Manai said, "Careful. Do what I say." Manai took Veronique back to the bedroom, had her lie face down on the bed again, and put the towel back over her head as he continued to search her room.

He then took her back to the living room, sat down, pulled down his clothes, got Veronique on her knees, and pulled her head toward his penis. While she orally copulated him, he said, "Don't do what you did last time. This time, you better swallow my sperm," and she did what he asked. He unbuttoned Veronique's shirt and moaned while he fondled her breasts. Manai then stood up, turned his back toward Veronique, and told her to lick his anus, which she did. He said her performance was not all that great and he said French women really did not know how to do that. He got dressed and took her back to the bedroom, putting the towel over her head again.

When Jouaneix returned, Manai gagged Veronique, tightened the rope around her hands, and tied up her feet. He told her, "I'm not worried about you. I assume you have got insurance. In any case, it's not in your best interest to lodge a complaint. And even if you file charges, I'll be out in five years. And if you do that, I will find you and—and if I

am not the one who finds you, something will happen to somebody in your family." She felt terrorized. After they left, Veronique was able to get her feet free from the rope, open the front door with her teeth, and went for help.

The Defense Case

Manai testified that he arrived in San Francisco on February 10, 2006, for a one-month visit. Manai said that he went to a bar on March 2, 2006, with Ali, a Frenchman he met two or three days after arriving in San Francisco, and that he drank two small beers. Manai and his friends then went to Place Pigalle, where Manai had a glass of wine and a small beer. At Place Pigalle, Manai said that he started talking to Suzy, and "[v]ery quickly, there was great feeling between [them]." At one point, he went outside to smoke a cigarette and saw Suzy, Claudia, and a couple of their male friends. The men asked if Manai wanted to go with them to Claudia's apartment, but Claudia said "No. No." The men pulled Claudia along and waved to Manai to come along, and Suzy took Manai by the hand. "I didn't want to go, because Claudia didn't want me to. But Suzy insisted, and so in the end I went with them."

At Claudia's apartment, the others played music, put cocaine on a table, and started rolling joints of marijuana. Manai said that he tried cocaine for the first time, but did not feel any effect. Manai claimed that Suzy was dancing in a very sexy manner and turning her buttocks toward him, and that he felt uncomfortable. Suzy asked him to massage her shoulders. Later, Suzy massaged Manai's shoulders. After a while, Manai said it was late and he was going to leave. Manai gave Suzy his phone number and Rivera, Fuentes, and Manai all left together.

It was pouring rain outside, so the three men hurried toward the bar. Rivera and Fuentes asked Manai if he wanted to go in the bar with them, but he declined and said he would call a cab. After they went in the bar, Manai looked for his cell phone and could not find it. He checked for his money and hotel key and found the money but not the key, so he returned to Claudia's apartment to get his phone and key. When Suzy opened the door, he told her he left his phone and key. She invited him in, but he said it was late and he just wanted to get his things and go to the hotel. Suzy looked for the phone and

key, but when she still had not found them a few minutes later she said, "Come in. Come in." Manai entered and Suzy handed him his phone from the table. Manai closed the door because of the rain and put the phone in his bag. Suzy handed Manai a towel and as she handed it to him she started kissing him. Manai said they engaged in "erotic foreplay." He claimed that Suzie then got on her knees and performed oral sex on him.

After several minutes, Manai said he saw Claudia to his right. "I had the impression that she stayed standing there for several seconds. She had no affect on her face. She was calm." Claudia approached, gently pushed Suzy to the side, grabbed Manai's penis with her left hand without looking at Manai, and put the penis in her mouth. After a few seconds, she bit down on Manai's penis. There was a kind of rage on Claudia's face. She scratched down Manai's chest and tried to punch his face. Manai pushed Claudia back and she fell down. "Suzy . . . didn't understand what was going on. She looked at me. She looked at Claudia." Claudia got up and approached Manai. He tried to grab her by the shoulders and Suzy tried to get between them. Claudia started screaming, "You want problem? You want problem?" and she tried to punch Manai again. Manai pushed Claudia several times as she kept attacking and trying to hit him. Suzy intervened several times to try to stop Claudia. Manai testified that at one point Claudia "came up against me and I really got fed up. So with my toes, I kicked her." Claudia "fell back onto [a chair]" and Suzy held her down so Manai had a chance to get dressed. Manai took his bag and left the apartment, leaving his coat behind. In his coat was about $450 to $500, all the money he had on him that day.[8]

Manai considered reporting Claudia to the police, and he discussed the incident the next day with friends, although he did not tell them Claudia bit his penis because he was embarrassed about that. Based on his friends' advice, he did not call the police.

[8] Manai did not tell Laws on March 6, 2006, that he left his coat in Claudia's apartment; in fact, he told Laws he had spent all of his money that night. He did not remember that detail when he spoke to her. "When I went to see her, I went to tell her that I had been attacked. And I found myself in an office with three police officers. So I was shocked, actually."

Later, Ali told him the police had called and wanted to speak to him. Manai called the inspector and described what happened in the apartment, and the inspector asked him to come down to see her. Manai already had a plane ticket to return to France the next day, but he went to her office. When he arrived, she read him his rights, arrested him, and asked if he wanted to explain what happened. Manai told her what happened.

As to his prior conviction for rape, Manai testified that when the incident with Veronique occurred in 1996, he had been celebrating his friend Jouaneix's graduation from university since midafternoon. They had visited at least 10 bars and three or four clubs, and he had consumed 15 to 20 drinks (cocktails and beers) and two doses of ecstasy.[9] When they ran out of money, they decided to steal money for a cab so they could get to their car, which was on the other side of Paris. They walked the streets looking for a man to rob, and eventually noticed someone entering a building. They followed the person up the stairs and found themselves behind a woman about to open her door. Manai took out a pocket knife and held it up to her neck. He then "behaved like a gangster," making her enter the apartment. He drank half a bottle of whiskey while in her apartment. He did not remember everything that happened in the apartment. The next morning, a police officer told him what happened and Manai started crying. "[W]hen I realized that I had conducted myself like a monster, I was in despair." In a March 1997 French judicial proceeding, Manai acknowledged that he had asked the victim to perform fellatio on him twice, asked her to swallow his sperm, asked her to lick his anus, and made comments on how she was licking his anus. Manai testified at this trial that he made those statements in 1997 based on the victim's own declarations, his codefendant's declarations, and some memories he had of the incident. "I repeated everything that the victim had said. And I assume[d] responsibility." In 1999, Manai was convicted by a French jury of rape. Although he was sentenced to eight years in

[9] In a March 1997 French judicial proceeding, Manai denied having been drunk or under the effect of drugs during the incident. At the January 2007 trial, he said he had denied using drugs or alcohol during the French proceedings because he wanted to assume full responsibility for the incident.

prison, he served a total of four years in a detention center as part of a work program due to his young age and lack of criminal history.

Marine Vaisset testified that she met Manai through a friend one or two weeks after Manai arrived in San Francisco in February 2006. They all went out to a club and danced. Vaisset and Manai returned to her house, got in her bed, and started kissing. Then he performed oral sex on her. "I was aggressive with him. He didn't want to have sex with me." He only wanted to please Vaisset. They fell asleep and when they awoke in the morning, Manai smoked some cigarettes, talked to her friends, and left. He was never aggressive toward her and she never saw him act aggressively toward anyone else. She was with Manai and other friends at Place Pigalle in March 2006, and Manai did not seem drunk that night. When asked on cross-examination if her opinion of Manai would change if she knew he had been convicted of rape in France in 1999, she said, "I don't know."

Jeni McCoy testified that she met Manai at a bar in the Mission District. They spent the rest of the evening together and ended up spending the night at the house of McCoy's friend. McCoy and Manai slept in the same bed, but had no sexual contact and Manai did not try to force her to perform any sex act. The following day, McCoy and Manai spent the day together walking around San Francisco and discussing the nonviolent philosophy of Buddhism and she formed the opinion he was a nonviolent person. Manai never acted aggressively toward her and she never observed him act aggressively toward anyone else. McCoy later went with Manai and others at Place Pigalle and Manai did not seem drunk on that occasion. When she was asked on cross-examination if her opinion of Manai would change if she knew he had been convicted of rape in Paris in 1999, she said, "I can only tell you based on my experience with the defendant. I have no idea what his character was like 10 years ago."

Kenneth Allen Mark, a forensic toxicologist, testified for the defense as a qualified expert in the area of drug and alcohol use and their effects. He explained that, depending on a particular individual's tolerance level, a 0.10 percent blood alcohol level will often cause visible impairment such unsteadiness in walking or difficulty performing simple

tasks like taking a license out of a wallet. A 0.15 percent blood alcohol level will cause about half of the population to become "grossly intoxicated," what most people would call "drunk." "They stumble. They fumble around a lot. They are confused to a certain degree." When a person consumes both alcohol and marijuana, "[i]f the amount of marijuana that was smoked was an amount that would affect the individual, . . . it makes a substantial increase in the effect of alcohol." Cocaine is a stimulant and can cause an increase in aggressiveness and libido or sexual drive. A person who drank alcohol, smoked marijuana, and then used cocaine (assuming significant quantities of each) would have impaired perception and judgment, increased aggressiveness, and possibly increased sexual drive. Ordinarily, a first time user of cocaine would be more dramatically affected than someone who had used it before.

A person five feet four inches tall and weighing 150 pounds (like Suzy) who consumed two pints of beer and three glasses of wine between 8:30 p.m. and midnight, two swigs or shots of whiskey and some cocaine between midnight and 2:00 a.m., and marijuana sometime between 8:30 p.m. and 2:00 a.m. would have a blood alcohol level of between 0.085 and 0.12 percent at 2:00 a.m., and the effects of this blood alcohol level would be enhanced by the marijuana and cocaine to cause the person's judgment to be compromised.[10] At 4:00 a.m., the effects of the marijuana and cocaine would have worn off. If the same person consumed two pints of beer and three glasses of wine between 10:00 p.m. and midnight, two swigs or shots of whiskey and some cocaine between midnight and 2:00 a.m., and marijuana sometime between 10:00 p.m. and 2:00 a.m., she would have a blood alcohol level of between 0.12 and 0.14 percent at 2:00 a.m., and the effects of this blood alcohol level would be enhanced by the marijuana and cocaine to cause the person's judgment to be compromised. A person five feet three inches tall and weighing 110 pounds (like Claudia) who consumed one pint of beer and two glasses of wine between 8:30 p.m. and midnight, and one shot of whiskey and some marijuana and

[10] The hypotheticals were based on testimony as to the quantity of intoxicants that the victims had consumed.

cocaine between midnight and 2:00 a.m. would have a blood alcohol level of about 0.07 percent at 2:00 a.m., and the effects of this blood alcohol level would be enhanced by the marijuana and cocaine. "You are going to have a person whose perception is affected. Their ability to recall might be affected, to a certain extent." At 4:00 a.m., the effects of the marijuana and cocaine would have worn off.

Verdict and Sentence

The jury found Manai guilty of all counts and found all of the allegations before it true.[11] The court granted the prosecution's motion to dismiss the prior conviction allegations in the interest of justice pursuant to section 1385.

Manai filed a motion for new trial on the grounds that the court erred by admitting evidence of Manai's prior conviction of rape, by excluding evidence that Suzy and Claudia were involved in a romantic relationship, and by refusing to dismiss Juror No. 12 during the trial for cause. The court denied the motion.

On November 8, 2007, the court sentenced Manai to life in state prison. For each of the forcible oral copulation convictions (counts 2 and 6), he was sentenced to 25 years to life pursuant to the alternative sentencing scheme of section 667.61, plus an aggravated 10-year term for the deadly weapon use enhancement, with the sentences to run consecutively. For the sexual battery conviction (count 3), he was also sentenced to an upper four-year term plus a one-year enhancement for the deadly weapon use. His sentences for the other counts were stayed pursuant to section 654.

II. DISCUSSION

A. Admission of Propensity Evidence under Evidence Code Section 1108

Manai asserts that it was error to admit evidence of his 1996 rape of Veronique in Paris pursuant to Evidence Code section 1108 (section 1108) to prove his propensity to commit a sexual offense. He argues the evidence should have been excluded as unduly prejudicial under Evidence Code section 352 (section 352). There was no error.

[11] The prior conviction allegations were tried to the court.

1. *Background*

Before the January 2007 trial, the prosecutor moved in limine to admit evidence of Manai's 1996 sexual assault of Veronique P. pursuant to section 1108. Manai opposed the motion on the grounds that the Paris offense was 10 years old and the crimes were substantially dissimilar. He argued the evidence should be excluded pursuant to section 352. The prosecutor responded that recentness and similarity were not requirements of section 1108, and that the crimes were substantially similar in any event.

The trial court admitted the evidence. It found the 1996 crime was not remote in time and was similar to the charged crimes in several respects. Although noting that similarity was only a factor to be considered, and not a requirement for admissibility under section 1108, the court observed that both the prior and current offense involved forced oral copulation, the use of sharpened instruments as weapons, violation of the victims in their own apartments, evidence of some preplanning, and alcohol or drug use (or both). The court noted that Manai's conviction of the Paris crime increased the certainty that he had actually committed that crime and mitigated the danger that the jury would convict him of the charged offenses in order to punish him for the prior offense. The court found that the Paris incident was not more egregious or inflammatory than the currently charged crimes, and any prejudice would be minimized by the court's providing a limiting instruction before the jury heard testimony about the prior offense. Finally, because the evidence would be admitted through the testimony of a single witness, it would not consume an undue amount of time. Manai raised the issue again as a basis for his motion for new trial, which was denied without further discussion of the issue by the trial court.

2. *Legal Standards*

Ordinarily, evidence that a defendant committed an uncharged crime or wrongful act is inadmissible to prove that person's propensity to commit such an act. (See Evid. Code, § 1101, subd. (a).) Section 1108 relaxes the rule in sex offense cases: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible

by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (§ 1108, subd. (a).) The statute does not violate the due process guarantees of the federal and California constitutions because of its safeguards that the defendant must receive pretrial notice of the prosecution's intent to use such evidence and the evidence must be admissible under section 352. (*People v. Falsetta* (1999) 21 Cal.4th 903, 915–917.)

"[T]he Legislature's principal justification for adopting section 1108 was a practical one: By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations. . . . [¶] . . . [E]vidence that [a defendant] committed other sex offenses is at least circumstantially *relevant* to the issue of his disposition or propensity to commit these offenses. . . . 'Such evidence "is [deemed] objectionable, not because it has no appreciable probative value, *but because it has too much*." . . . [Citations.]' [Citations.]" (*Falsetta, supra,* 21 Cal.4th at p. 915.)

Under section 352, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." When determining whether to admit evidence of a prior sex offense under sections 1108 and 352, the trial court "must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Falsetta, supra,* 21 Cal.4th at p. 917.) The trial court enjoys broad discretion in determining whether to admit such evidence under section 352 and its exercise of discretion must not

be disturbed on appeal unless arbitrary, capricious, or patently absurd and resulting in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

We agree with the trial court's analysis of the offered evidence. As noted, Manai objected to the admission of Veronique's testimony because of the alleged dissimilarity of the crimes. It is true that similarity between sexual crimes increases the probative value of prior sexual offense evidence. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1287.) However, strict similarity is not required and is not essential to the relevance and probative value of the evidence, as it might be when evidence is admitted under Evidence Code section 1101, subdivision (b) to prove, for example, a common design or plan. (See *People v. Frazier* (2001) 89 Cal.App.4th 30, 40-41 [contrasting similarity requirement for admission of evidence under Evid. Code, §§ 1101, subd. (b), and 1108]; *People v. Britt* (2002) 104 Cal.App.4th 500, 505-506 [same].)

As the trial court found, there were substantial similarities between the crimes. Both incidents took place inside the victims' homes. In both crimes, Manai first gained control over the victim by holding a sharp instrument to her neck, while wrapping his other arm around her neck and shoulder area. In both, he expressly or impliedly threatened to harm the victims if they did not cooperate. He repeatedly told the victims in both incidents not to look at him and he took steps to keep them from looking at him (by wearing glasses and putting a towel over Veronique's head, and by hitting Suzy and Claudia repeatedly to make them look away). In both, he moved the victims around roughly by grabbing their hair or clothes and partially dragging them. In both, he ordered the victims to orally copulate him while they were on their knees and he fondled their breasts while moaning. He also commented on the quality of both Veronique's and Suzy's sexual performance. There were, of course, differences between the incidents. Most notably, in the Paris incident, Manai worked with an accomplice, he forced his way into the victim's apartment, he searched the apartment and stole many of the victim's belongings, the victim was a stranger before the attack began, he did not ask her to act

like a dog, and he did not force her to undress.[12] However, as noted, strict similarity is not required. Considering each incident in its entirety, the trial court reasonably concluded the similarities were substantial and thus the probative value of the evidence was strong.

Manai notes that the French crime occurred almost 10 years before the San Francisco incident, implying that the lapse in time reduced the probative value of the evidence. However, Manai received an eight-year sentence for the crime and he testified, "I served my sentence in two parts. In total, I spent four years in a detention center . . . ." He did not say when he was most recently released from custody. We agree with the trial court that the crime was not so remote in time as to lessen its probative value to a point that the evidence should have been excluded.

Manai argues that the facts of the French crime were more inflammatory than the current crime and thus likely to cause undue prejudice. He cites the fact that the Paris crime took place in the context of a home invasion robbery and that he forced Veronique to lick his anus and then demeaned her performance. However, certain facts of the San Francisco crime were more inflammatory than the French one: Manai took advantage of trust he had engendered in the victims by socializing with them; he used much greater violence than was reported by Veronique (hitting Suzy and Claudia repeatedly on the head, kicking Claudia in the ribs, and dragging the victims from room to room by the hair); and the sexual assault went through several stages, appeared to be escalating, and showed no signs of abating before Claudia interrupted it by biting Manai's penis.

Finally, Manai argues the jury might have been tempted to convict him of the San Francisco crime as punishment for the Paris incident because, while the jury heard that Manai was punished for the sexual crime against Veronique, it did not hear that

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[12] In the trial court, Manai argued the crimes were dissimilar because he testified he was heavily intoxicated during the Paris incident, but there was no claim he was intoxicated during the San Francisco incident. However, the evidence of his intoxication was equivocal in each instance. The prosecutor impeached Manai's testimony about drinking heavily and using drugs before the Paris incident, and there was evidence he both drank and used cocaine before the San Francisco incident.

Manai was ever punished for the burglary of Veronique's home. It is unlikely the jury parsed the evidence of Manai's conviction so finely or that they focused on the Paris burglary as distinct from the sexual offense. As noted by the trial court, evidence of Manai's conviction for the Paris incident both enhanced the probative value of the evidence (because it increased the certainty that he committed the crime), and reduced the danger that the jury would convict him of the charged San Francisco crimes in order to punish him for the Paris ones. The conviction also mitigated the danger that it would be an undue burden on Manai to defend against evidence of the prior sexual offense, as it appears he had a full opportunity to defend himself during the French judicial proceedings.[13]

Admission of evidence of the Paris crime in the circumstances of this case served the legislative intent of section 1108. This case, like most sexual assault prosecutions, came down to a credibility contest between the defendant and the complaining witnesses. There were no other eyewitnesses to the incident and the physical evidence was limited. Evidence that Manai had committed a prior sexual offense with many similarities to the charged crimes assisted the jury in resolving this credibility contest by providing them with highly probative evidence about Manai's propensity to commit such crimes. The trial court did not abuse its discretion in admitting the evidence. Nor has Manai established a violation of his federal due process rights, which requires a showing that admission of the evidence rendered the trial fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70, 75 (*McGuire*).)

B. Exclusion of Evidence Suggesting a Romantic Relationship Between the Victims

Manai argues that the trial court prejudicially erred by excluding his proffered evidence suggesting that Suzy and Claudia had a romantic relationship at the time of the incident. He argues the evidence was relevant because it would have helped explain

[13] We note that Manai admitted his guilt of the sexual assault of Veronique P. in the French criminal proceedings—and ultimately did so in his testimony in this trial.

Claudia's behavior during the incident as he described it on the witness stand. We conclude there was no error. We would, in any event, find any error to be harmless.

1. *Background*

Before the January 2007 trial, the prosecutor filed a motion to exclude evidence of the complaining witnesses' sexual lives, and Manai filed a motion to admit evidence of an alleged intimate relationship between Suzy and Claudia pursuant to Evidence Code section 782. In support of his motion, he made an offer of proof in a sworn declaration that he could produce a witness (Jeni McCoy) who would testify she saw Suzy and Claudia kissing and fondling each other earlier on the evening of the incident.[14] Manai argued the evidence was relevant to the victims' credibility regardless of evidentiary limitations imposed by Evidence Code sections 782 and 1103, subd.(c)(1) (sections 782 and 1103), on use of specific instances of sexual conduct by a complaining witness to attack credibility, and was admissible in any event under section 782 standards.

The court first found that the offered evidence consisted of specific acts of sexual conduct offered to attack the credibility of the complaining witnesses and was subject to preliminary review under section 782 procedures. The court considered Manai's offer of proof and found it to be to be insufficient to require an Evidence Code section 402 evidentiary hearing.[15] (See § 782, subd. (a)(3).) The court excluded the evidence because it was based on a one-time observation of the parties, by someone with no other knowledge of or connection with the parties, rendering its probative value slight. The court barred the defense from asking Suzy and Claudia whether they had a *sexual*

[14] Manai did not identify the witness in his written motion, but did so in his sealed declaration and offer of proof, and does so in his briefing here.

[15] In November 2006, at the earlier trial before Judge Miller, the court actually conducted an Evidence Code section 402 hearing at which McCoy testified that she talked to Suzy and Claudia at Place Pigalle on the night of the incident, saw them be very physically intimate with each other, heard them acknowledge they were a couple (but could not remember their exact words), and formed the firm impression that they were a couple. The court excluded the evidence. Manai's written offer of proof in the instant trial did not include any contention that Suzy and Claudia acknowledged to McCoy that they were a "couple."

relationship or presenting evidence of that relationship, but it allowed the defense to ask other questions about the complaining witnesses' relationship, including "their friendship, close ties, relationship over a period of years . . . such that it would induce one to fabricate a story or to support the story of the other."

At trial, Suzy and Claudia testified that they were best friends who had known each other for at least 13 years by the time of trial. In March 2006, Suzy lived in Oakland, and Claudia lived with her husband in San Francisco. Suzy usually saw Claudia after work and she spent the night at Claudia's apartment on the night of March 2 to 3, 2006, while Claudia's husband was away for work. At the time of the January 2007 trial, Suzy was living with Claudia in her apartment. They had been living together since November 2006, and were partners in a business. Suzy had broken up with her boyfriend and Claudia's husband had stopped living with her. Suzy sometimes slept in the living room and sometimes in Claudia's bed.

Manai again raised the exclusion of his proposed evidence as a basis for his motion for a new trial, and the court denied that motion without specifically revisiting the issue.

2. *Legal Standards*

A defendant generally cannot question a sexual assault victim about his or her prior sexual activity. (§ 1103, subd. (c)(1); *People v. Woodward* (2004) 116 Cal.App.4th 821, 831.) A limited exception is provided if the victim's prior sexual history is relevant to the victim's credibility. (§ 1103, subd. (c)(5);[16] *People v. Chandler* (1997) 56 Cal.App.4th 703, 707 (*Chandler*).)

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[16] "Notwithstanding any other provision of this code to the contrary, and except as provided in this subdivision, in any prosecution [for forcible oral copulation] under Section . . . 288a [with exceptions not relevant here], opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the complaining witness." (§ 1103, subd. (c)(1).) However, "[n]othing in this subdivision shall be construed to make inadmissible any evidence offered to attack the credibility of the complaining witness as provided in Section 782." (§ 1103, subd. (c)(5).)

Section 782 provides that in a prosecution under section 288a, "if evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness under Section 780,[17] the following procedure shall be followed: [¶] (1) A written motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness. [¶] (2) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated. The affidavit shall be filed under seal and only unsealed by the court to determine if the offer of proof is sufficient to order a hearing pursuant to paragraph (3). After that determination, the affidavit shall be resealed by the court. [¶] (3) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant. [¶] (4) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant pursuant to Section 780, and is not inadmissible pursuant to Section 352, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court." (§ 782, subds. (a), (c)(1).)

Section 782 provides for a strict procedure that includes a hearing outside the presence of the jury prior to the admission of evidence of the complaining witness's sexual conduct. (*Chandler, supra,* 56 Cal.App.4th at p. 708.) "[S]ection 782 is designed to protect victims of molestation from 'embarrassing personal disclosures' unless the defense is able to show in advance that the victim's sexual conduct is relevant to the

[17] Evidence Code section 780 provides, "Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing . . . ."

victim's credibility. [Citation.]" (*People v. Bautista* (2008) 163 Cal.App.4th 762, 781-782 (*Bautista*).)

At least one court has noted an inherent tension between section 782 and section 1103, subdivision (c)(1) [formerly § 1103, subd. (b)(1)—prohibiting use of specific acts of sexual conduct by the victim to prove consent]. (*People v. Rioz* (1984) 161 Cal.App.3d 905, 915 (*Rioz*).) The procedures provided under section 782 and the discretion provided to the trial court in determining admissibility provides an appropriate resolution of that tension by "recogniz[ing] both the right of the victim to be free from unwarranted intrusion into her privacy and sexual life beyond the offense charged and the right of a defendant who makes the necessary sworn offer of proof in order to place the credibility of the complaining witness at issue to fully establish the proffered defense." (*Rioz*, at p. 917.) "Great care must be taken to insure that this exception to the general rule barring evidence of a complaining witness' prior sexual conduct . . . does not impermissibly encroach upon the rule itself and become a 'back door' for admitting otherwise inadmissible evidence." (*Id.* at p. 918–919.)

"[S]ection 782 vest[s] broad discretion in the trial court to weigh the defendant's proffered evidence, prior to its submission to the jury, and to resolve the conflicting interests of the complaining witness and the defendant. Initially, the trial court need not even hold a hearing unless it first determines that the defendant's sworn offer of proof is sufficient." (*Rioz, supra,* 161 Cal.App.3d at p. 916.) The offer is "sufficient" if the judge determines that the evidence, assuming it is as defendant claims, is relevant, and that its probative value is not outweighed by the probability of undue prejudice or the undue consumption of trial time. (*People v. Blackburn* (1976) 56 Cal.App.3d 685 (*Blackburn*).) Even if a hearing is then held, the statute specifically reaffirms the trial court's discretion, pursuant to section 352, to exclude relevant evidence which is more prejudicial than probative. (*Rioz, supra,* at p. 916.) " 'A trial court's ruling on the admissibility of prior sexual conduct will be overturned on appeal only if appellant can show an abuse of discretion.' " (*Bautista, supra,* 163 Cal.App.4th at p. 782.)

3. *Analysis*

We first disagree with Manai's contention that the evidence he proffered was not evidence of sexual conduct within the meaning of sections 1103 and 782, and that it was not subject to the limitations of those sections. "[S]exual conduct, as that term is used in sections 782 and 1103, encompasses any behavior that reflects the actor's or speaker's willingness to engage in sexual activity. The term should not be narrowly construed." (*People v. Franklin* (1994) 25 Cal.App.4th 328, 334, fn. omitted (*Franklin*).)

Manai is correct that sections 1103 and 782 do not require the exclusion of all evidence of a complaining witness's sexual conduct. There is "a distinction between evidence of prior sexual conduct offered to prove the character of the complaining witness and evidence of such conduct offered on a noncharacter theory. [Citations.] . . . [N]oncharacter evidence relevant to the witness's credibility may still be admissible even though involving prior sexual conduct. . . . '[W]hen the evidence is offered on a noncharacter theory, the *mere* fact of prior sexual conduct is never in itself important. It becomes important only when linked with other facts that prove, for example, modus operandi or motive to lie. . . .' [Citation.]" (*People v. Steele* (1989) 210 Cal.App.3d 67, 75.)

Sections 1103 and 782 are designed to exclude evidence only if the jury is asked to infer from the witness's sexual conduct that the witness had a character that made him or her likely to consent to engage in sexual activity with the defendant. In *Franklin*, a defendant facing a child sexual abuse charge sought to introduce evidence that the alleged victim had falsely accused her mother of committing a sexual offense against her. (*Franklin, supra,* 25 Cal.App.4th at pp. 330, 335.) The court of appeal held the evidence should have been admitted even though the defendant had not complied with section 782. (*Id.* at pp. 334–335.) "Even though the content of the statement has to do with sexual conduct, the sexual conduct is not the fact from which the jury is asked to draw an inference about the witness's credibility. [Instead, t]he jury is asked to draw an inference about the witness's credibility from the fact that she stated as true something that was false." (*Id.* at p. 335; see also *People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1455–

1456 [evidence that witness who alleged rape had made prior false rape claims was not subject to § 782].) In *People v. Varona*, a defendant facing rape and forcible oral copulation charges offered evidence that the complaining witness was a prostitute who specialized in oral copulation. (*People v. Varona* (1983) 143 Cal.App.3d 566, 568.) The court of appeal held the trial court abused its discretion in denying a motion to admit the evidence under section 782 because the evidence directly contradicted the complaining witness's testimony about why she was at the location where she met the defendant, and corroborated defendant's testimony that she agreed to perform the sexual acts for pay. (*Id.* at pp. 569–570.) In *Rioz*, the defendant's conviction (and that of his codefendants) was reversed and remanded on the ground that the defendants had been improperly required to share an interpreter. (*Rioz, supra*, 161 Cal.App.3d at p. 913.) The court held that on retrial the trial court was required to consider the admissibility of evidence alleging that the victim was a prostitute who had offered sex for money. (*Id.* at pp. 918-919.) The court noted, however, that in considering such evidence the trial court should insist on strict compliance with the statutory requirements of section 782, and that a defendant advancing a defense of consent bears the burden of affirmatively offering to prove, under oath, the relevance of the complaining witness's sexual conduct to attack her credibility in some way other than by deprecating her character. (*Ibid*.) The court also noted that the trial court retained its discretion under section 352 to determine the admissibility of the evidence after conducting a section 782 hearing. (*Ibid.*)

Manai argued that he did not seek to introduce evidence of Suzy and Claudia's purported relationship on a prohibited character theory. Rather, he contended that because Claudia had a sexual relationship with (or interest in) Suzy, she reacted with anger and jealousy when she witnessed what Manai testified was Suzy's voluntary, consensual oral copulation of Manai. He asserted that, fueled by this jealousy, Claudia attacked him, and perhaps because of the sexual source of her anger she attacked him sexually, by taking his penis in her mouth and biting down on it. This theory asked the jury to infer from the strength and nature of Claudia's alleged feelings for Suzy that Manai's description of her behavior was credible, and from Suzy and Claudia's mutual

feelings for each other that they had a motive subsequently to lie about what occurred that night. Even under that theory, however, Manai was offering evidence of specific acts of sexual conduct to "attack the credibility of the complaining witness," triggering the review requirements under section 782.[18] The court made that review, finding the probative value of the offered evidence to be slight, and insufficient to trigger a further evidentiary hearing.

The trial court was well within its discretion, under section 352, in determining that, even assuming Manai's offer of proof was true, and that the evidence was relevant and had some probative value, its probative value was outweighed by the probability of undue prejudice or the undue consumption of trial time. (*Blackburn, supra,* 56 Cal.App.3d at pp. 691–692.) Here, the trial court expressly found that the probative value of the proffered evidence was slight because it was based on a witness's one-time observation of the victims in a bar. Further, even if we were to accept that Suzy and Claudia had a sexual relationship (or that Claudia had a sexual interest in Suzy), the probative value of the evidence to prove that Claudia acted in the manner described by Manai would be slight. If the motive for what Manai claimed was Claudia's physical assault on him was jealous anger, he fails to explain how this is also consistent with his

[18] In his briefing here, Manai asserts that in the trial court he attempted to do "two things," acknowledging that he "sought to *attack Suzy T.'s credibility*: specifically, her testimony that she had not *consented* to kiss him or let him touch her, or that she agreed to orally copulate him. Second, he sought to support the defense theory of the case, that Claudia [ ] unexpectedly appeared during the mutually consensual sex act, and attacked appellant." (Italics added.) To the extent that Manai now acknowledges that his purpose was at least in part to argue that the evidence supported a claim of consent by one victim, the trial court's observation that the proffer could be considered a "backdoor" effort to avoid the limitations of section 782 appears apt.

To the extent *Franklin, supra,* 25 Cal.App.4th 328, and *Tidwell,supra,* 163 Cal.App.4th 1447 hold or suggest that sexual conduct evidence offered on a noncharacter theory is not subject to section 782, we disagree. While we agree that the character or noncharacter purpose of an offer of sexual conduct evidence is relevant to the section 352 analysis under section 782, there is no statutory basis to exempt evidence offered on a noncharacter theory from the procedural requirements of section 782.

claim that Claudia initially joined willingly in the sexual encounter, even after allegedly walking in on a cheating sexual partner.

On the other side of the scale, the potential prejudicial effect of such evidence is apparent. While not directly *offered* on a character theory, there was a danger that the jury would consider the evidence for this purpose. Moreover, there was a danger of undue consumption of time by examination and cross-examination of McCoy on this matter and presentation of rebuttal evidence by the prosecution.[19]

We find no abuse of the broad discretion vested in the trial court to weigh the defendant's proffered evidence, and to resolve the conflicting interests of the complaining witness and the defendant. (*Rioz, supra*, 161 Cal.App.3d at p. 916.)

Manai also argues the exclusion of this evidence violated his federal constitutional right to present a defense. Ordinarily, the application of state rules of evidence such as section 352 does not implicate a criminal defendant's federal constitutional rights. (*Lewis, supra,* 46 Cal.4th 1255, 1289; *People v. Hall* (1986) 41 Cal.3d 826, 834.) Section 352 "must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of *significant* probative value to his defense." (*People v. Reeder* (1978) 82 Cal.App.3d 543, 553.) For the reasons already discussed, the probative value of the evidence proffered by Manai was slight and its exclusion did not deprive him of a federal constitutional right. Further, "[a] trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted." (*People v. Quartermain* (1997) 16 Cal.4th 600, 623–624; *Bautista*, *supra*, 163 Cal.App.4th at p. 783.) We see nothing in this record to indicate that the jury received a misleading impression of the credibility of the complaining witnesses.

[19] The prosecution indicated it would call Claudia's husband as a rebuttal witness if McCoy's testimony on this issue were allowed.

4. *Prejudice*

Even if exclusion of the offered evidence were error, we would have no difficulty in finding it harmless. That is, there is no reasonable probability that exclusion of the evidence had an effect on the verdict. (See *People v. Samuels* (2005) 36 Cal.4th 96, 113 [harmless error analysis for evidentiary error governed by *People v. Watson* (1956) 46 Cal.2d 818, 836].) First, when the same issue arose in the November 2006 trial, the judge who heard McCoy's testimony at the Evidence Code section 402 hearing was not persuaded that the women McCoy described were even Suzy and Claudia. "Ms. McCoy . . . described the two females as edgy looking, eccentric, . . . she thought one might have had dread locks and one was Latina, and I observed the two complaining witnesses testify here. It's not at all clear to me what ethnicity they are from, what edgy looking or eccentric means. One or maybe both had their hair the day they testified in some kind of modified dread lock look. The description that Ms. McCoy gave of the two women who she allegedly saw that day is not at all [ ] obvious[ ] it's these individuals. And she has said she has never seen them since. [¶] I am concerned about the probative value versus the prejudicial value."[20] We can infer from these comments that, had the jury also had the opportunity to compare McCoy's description of the women to the complaining witnesses who appeared before them, they would have had some or substantial doubt whether McCoy was describing Suzy and Claudia and thus the persuasive value of the evidence would have been slight.

Second, despite the denial of Manai's motion, the jury heard substantial evidence about the nature of Suzy and Claudia's relationship, including some evidence that suggested they might be sexually involved. They heard that Suzy and Claudia had known each other for 13 years, that they were best friends, that they saw each other most days after work, that Suzy planned to spend the night at Claudia's apartment on the night

[20] Defense counsel argued the reliability of McCoy's identification could be tested in court by asking her to identify the women in photographs. However, defense counsel also said he had shown McCoy pictures of the women, thus rendering any subsequent identification of limited probative value.

of the attack while Claudia's husband was away, and that Suzy and Claudia separated from their male partners following the incident, moved in together, and at least occasionally shared the same bed. They heard that Suzy was very friendly with Manai at Place Pigalle while Claudia was more reserved, and that Suzy invited or encouraged Manai to join the other four at Claudia's apartment while Claudia was reluctant to let him come over. This evidence provided some support to Manai's defense.

Third and most importantly, even if the jury had been provided with unequivocal evidence that Suzy and Claudia had a sexual relationship, it is not reasonably probable the jury would have discredited Suzy and Claudia's account of the incident on this basis because of the abundant evidence corroborating their account. Within minutes of Manai's final departure from the apartment,[21] Suzy called 911 in hysterics and reported a sexual assault. The jury heard the recorded call, which even from the cold paper record reflects the victims' fear through their episodes of crying and hyperventilation, their panicked syntax, and their insistence that the police clearly identify themselves before they opened the apartment door. Officer Mahoney, who observed the victims immediately following the call, described their hysterical and distraught behavior to the

[21] According to the cell phone Suzy used, the 911 call was placed at 2:03 a.m. Officer Mahoney testified that he arrived at the apartment at 2:05 a.m. According to Suzy's account of the incident, she and Claudia arrived at Place Pigalle at about 10:00 p.m.; they were at the bar two to three hours (i.e., until sometime between midnight and 1:00 a.m.); Claudia went to bed at about 1:00 a.m; and Manai, Rivera, and Fuentes left the apartment at about 2:00 a.m. Claudia initially testified that she picked up Suzy from work at 9:00 p.m.; they arrived at the bar at 10:30 p.m.; they were at the bar one to two hours (i.e., until sometime between 11:30 p.m. and 12:30 a.m.); and she fell asleep back at her apartment at 12:30 a.m. She later testified that she and Suzy arrived at the bar at 8:30 p.m., but she did not explain how this change affected the other parts of her timeline. Rivera testified that it was 1:45 a.m. when they separated from Manai and reentered the bar after leaving Claudia's apartment. He remembered the time because it was last call at the bar. Manai did not testify to the times at which various events occurred. While these timelines do not exactly coincide, they tend to demonstrate (with the possible exception of Claudia's isolated 8:30 p.m. comment) that Suzy and Claudia had little opportunity to coordinate fabricated stories between the time Manai left the apartment and they called 911.

jury. Thayer and Laws confirmed the witnesses' continuing emotional distress only two hours later. Manai offers no explanation of why the complaining witnesses would have behaved in this manner and on this timeline if, as he contends, their stories were collusive fabrications. Moreover, the victims' physical injuries were consistent with their testimony; their full cooperation with the district attorneys' office following the incident[22] was more consistent with an honest report of a crime than with a false report that might unravel on investigation; and the properly-admitted evidence of the 1996 Paris crime dramatically demonstrated that Manai had a disposition to commit sexual offenses like those described by Suzy and Claudia.

Manai devoted much of his closing argument at the trial to inconsistencies in Suzy and Claudia's description of the incident at trial and in their various memorialized accounts of the incident. We conclude that, when the accounts are considered in their entireties and the timing of the reports are taken into consideration, the inconsistencies were not substantial compared to the overall consistency of the reports.

Finally, the jury had little difficulty reaching a verdict, which suggests they did not find the credibility determinations a close call.[23] The jury began its deliberations on February 1, 2007, at 10:55 a.m. and asked to be released for the day at 4:05 p.m. At that time, they asked a question about an apparent difference in the definition of burglary in

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[22] After their examinations and interviews at the hospital, Suzy and Claudia went to the Hall of Justice, where they met with Laws again. The women provided the inspector with Manai's phone number, which had been programmed into the cell phone, and Laws dialed the number, which went to voice mail. Laws then drove Suzy and Claudia to the area of a hostel where Manai said he was staying, but they did not locate him there. Laws then took them to Claudia's apartment and viewed the scene of the incident. Suzy and Claudia identified some items in the apartment Manai had touched to help with the investigation. On about March 6, 2006, Claudia met with a sketch artist to prepare a sketch of Manai.

[23] We acknowledge that the November 2006 trial resulted in a hung jury, which can be a significant factor in harmless error analysis. (See, e.g., *People v. Brooks* (1979) 88 Cal.App.3d 180, 188.) However, the comparison is inapt in this case because the November 2006 jury did not hear Veronique's properly admitted and highly probative testimony about Manai's prior sexual offense.

count 1 and in the section 667.61 allegations for counts 2 and 4. When the jury reconvened on February 2 at 10:00 a.m., they received an answer to that question and they returned a verdict at 12:40 p.m. These circumstances strongly suggest that within about four hours of beginning deliberations (not counting their lunch break), the jury had determined that Manai was guilty of the sexual offenses and was already working on the details of the other charges, which they resolved the following morning after receiving additional guidance from the court.

Because the probative value of the excluded evidence was slight, the evidence corroborating their account of the incident was strong, and the jury apparently had little difficulty in crediting the complaining witnesses' testimony over Manai's, we conclude that the exclusion of the evidence, even if error, was harmless.[24]

C. Failure to Instruct on Promise of Immunity or Leniency

Manai argues the trial court erred by failing sua sponte to instruct the jury that, in assessing witness credibility, they should consider whether the witness was offered immunity or promises of leniency from the prosecution in exchange for their testimony. The People argue the instruction was not required because no witnesses were offered immunity or promises of leniency in exchange for their testimony; instead, the prosecutor simply told some witnesses before trial that the district attorney did not intend to prosecute them for their illegal drug use or possession on the night of the incident even if they admitted that use when testifying at trial. We conclude there was no error.

1. *Background*

Before the November 2006 trial, Manai alerted the court that some prosecution witnesses might assert their Fifth Amendment right not to testify. The prosecutor acknowledged that Suzy, Claudia, Fuentes, and Rivera might be asked on the witness stand whether they used or furnished illegal drugs on the night of the incident. Although the prosecutor did not intend to offer any of the witnesses formal immunity, and informed

[24] We reiterate that we have found no error. We also conclude that, even if there were errors, the cumulative effect of the errors was harmless under the standard of *People v. Watson, supra,* 46 Cal.2d at page 836.

the court that she was not prepared to offer any of these witnesses formal immunity, she had told them all that she "certainly would not prosecute them. I haven't heard of my office prosecuting someone in that situation, and there was no plan to prosecute them." Defense counsel commented, "That sounds like immunity to me." The prosecutor explained that she was taking her stated position because "[i]f I offer immunity or even give an equivocal statement, that might be something that [the] defense might offer into evidence to impugn the credibility of these witnesses[.]" At a later hearing, she stated that she did not have enough evidence to prosecute the drug crimes even if the witnesses admitted their conduct under oath. "[T]here is no corpus regarding that crime. There is no evidence other than the actual individual[s'] statements who would be defendant[s], and the statements of other individuals would be statements of co-conspirators [which] also do not amount to corpus, ... [¶] . . . [¶] I don't think legally we can bring such charges, and I spoke to the head of narcotics about this very issue, ..."

The court (Judge Miller) appointed counsel for each of the witnesses to advise them on the matter, and held hearings to determine whether they intended to waive their Fifth Amendment privilege. Suzy's attorney informed the court that he had advised Suzy on the matter and Suzy still wanted to testify in the case. Claudia's attorney informed the court, "I don't see any corpus delicti, and I don't see any basis for oppressing [*sic*] a Fifth Amendment claim based on my current understanding." Rivera's attorney stated, "I do believe he has a [F]ifth [A]mendment privilege in this case[;] however, Mr. Rivera has advised me that he would like to go forward with his testimony and . . . is not asking to invoke his right against self incrimination."[25]

At the January 2007 trial, the court (Judge Lee) said during a discussion of jury instructions that the instruction on witness credibility (CALCRIM No. 226) would not

[25] Manai does not direct our attention to any similar hearings before the January 2007 trial. In our own review of the record, we discovered that similar hearings took place with respect to Claudia on January 18, 2007, and Rivera on January 23, 2007. Claudia's attorney again said he did not see a Fifth Amendment claim, and Rivera again waived his Fifth Amendment right not to testify. We do not find any record of such a hearing held with respect to Suzy.

include a reference to whether a witness received a promise of immunity or leniency in exchange for his or her testimony because this was not an issue in the case.[26] Neither party objected.

2. *Analysis*

There was no error. Although the trial court is required sua sponte to instruct the jury on all applicable principles of law (*People v. Michaels* (2002) 28 Cal.4th 486, 529–530), CALCRIM No. 226's reference to immunity or leniency did not apply to this case because there was no quid pro quo promise made by the prosecution with respect to the witnesses' testimony. We agree that the prosecutor likely intended to encourage the witnesses to testify when she told them she had no intention of prosecuting them. Nevertheless, the record is also clear that the prosecutor never promised them immunity, the witnesses knew they had not been provided with immunity, and the witnesses decided to testify despite this fact after receiving the advice of independent counsel. Manai argues the prosecutor manipulated the situation in order to avoid the effect of the immunity or leniency instruction. However, Manai never requested a modified instruction that would have fit the specific facts of the case. Also, he does not contest the prosecutor's statement, as an alternative ground for her actions, that she did not have sufficient evidence to prosecute the witnesses for drug crimes even if they testified to drug use and possession. For the same reasons, we easily conclude that the omission of this instruction did not so infect the trial with unfairness as to amount to a violation of federal due process. (*McGuire, supra,* 502 U.S. at p. 72.)

Even if the instruction should have been given, any error was harmless. The jury heard that the prosecutor had told Suzy and Claudia she did not intend to prosecute them for the illegal drug use they admitted during their testimony. Although Rivera did not testify to the same effect, Manai has not shown that he was precluded from eliciting such

[26] CALCRIM No. 226 provides in part: "In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are: [¶] . . . [¶] [Was the witness promised immunity or leniency in exchange for his or her testimony?]"

testimony from Rivera on cross-examination. The jury was also instructed to use its common sense and understanding in assessing credibility, and specifically was told to ask themselves, "Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided?" (CALCRIM No. 226.) Manai was certainly free to have argued that the witnesses logically would be concerned about whether they would be prosecuted for their admitted drug use, would infer that the prosecutor wanted them to testify in a manner that led to the conviction of Manai, and that the prosecutor might change her mind about prosecuting them in the future. Manai made no such argument. There was no prejudicial error.

D. Failure to Instruct on Corpus Delicti

Manai argues the trial court erred by failing sua sponte to instruct the jury on the corpus delicti rule. The People argue the instruction did not apply on the facts of this case. We agree.

1. *Background*

Although the prosecutor requested a corpus delicti instruction (CALCRIM No. 359) "on the theory of better safe than sorry," the court said the instruction did not apply to the case and defense counsel agreed.[27] When the court asked the prosecutor, "What part of the defendant's extrajudicial statements do you feel form part of the prosecutor's evidence?" the prosecutor withdrew her request for the instruction.

[27] On appeal, the People draw attention to the fact that defense counsel agreed the instruction did not apply, but do not make a forfeiture or waiver argument. Assuming the People intend to argue that Manai invited any trial court error by agreeing that the instruction did not apply, we disagree. The invited error doctrine applies only if it is " 'clear that counsel acted for tactical reasons and not out of ignorance and mistake.' " (*People v. Coffman* (2004) 34 Cal.4th 1, 49.) The People do not identify, and we do not perceive, any tactical reason for defense counsel's agreement that the court did not need to provide the instruction.

2. *Legal Standards*

"To convict an accused of a criminal offense, the prosecution must prove that (1) a crime actually occurred, and (2) the accused was the perpetrator. Though no statute or constitutional principle requires it, California, like most American jurisdictions, has historically adhered to the rule that the first of these components—the corpus delicti or body of the crime—cannot be proved by *exclusive* reliance on the defendant's extrajudicial statements. [¶] . . . Whenever such statements form part of the prosecutor's case, the jury must be instructed that conviction requires some additional proof the crime occurred." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1164-1165 (*Alvarez*).) CALCRIM No. 359 satisfies this instructional requirement.[28] "This rule is intended to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened." (*Alvarez*, at p. 1169.)

The corpus delicti instruction applies to "preoffense statements of later intent as well as to postoffense admissions and confessions [citation], but not to a statement that is *part of the crime itself*." (*People v. Carpenter* (1997) 15 Cal.4th 312, 394 (*Carpenter*);

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[28] CALCRIM No. 359 provides: "The defendant may not be convicted of any crime based on (his/her) out-of-court statement[s] alone. You may only rely on the defendant's out-of-court statements to convict (him/her) if you conclude that other evidence shows that the charged crime [or a lesser included offense] was committed. [¶] That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed. [¶] The identity of the person who committed the crime [and the degree of the crime] may be proved by the defendant's statement[s] alone. [¶] You may not convict the defendant unless the People have proved (his/her) guilt beyond a reasonable doubt."

Manai argues "CALCRIM 359 is a companion instruction to CALCRIM 358 [an instruction that out-of-court statements by a defendant should be viewed with caution, which was given in Manai's case], and must be given sua sponte whenever CALCRIM 358 is given." (Italics omitted, fn. omitted.) The cases he cites for this proposition do not support it and the bench notes to the CALCRIM instructions contradict it. The bench notes to CALCRIM No. 359 state that when that instruction is given, CALCRIM No. 358 "must always be given" as well, but the bench notes to CALCRIM No. 358 merely alert the trial court that if CALCRIM No. 358 is given, CALCRIM No. 359 "may also have to be given." (Bench Notes to CALCRIM Nos. 358, 359 (2009–2010) pp. 133–134.)

Alvarez, supra, 27 Cal.4th at pp. 1170–1171.) In *Carpenter*, the Supreme Court held that a defendant's statement to a victim that he wanted to rape her was sufficient without corroboration to prove the defendant's intent to commit that crime. (*Carpenter*, at pp. 393-394.) "Defendant's statement to [the victim] of present intent was part of the crime; it could not be a confession to a crime that never occurred." (*Id.* at p. 394; see also *In re I. M.* (2005) 125 Cal.App.4th 1195, 1203–1204 [misleading statement to police was itself part of the crime of being an accessory after the fact of murder]; *People v. Chan* (2005) 128 Cal.App.4th 408, 420–421 [false statement on sex offender registration card was itself part of the crime of failing to register as a sex offender].)

The extrajudicial statements Manai identifies as part of the prosecution's case all fall outside the corpus delicti rule. First, he cites statements that, according to Suzy's and Claudia's testimony, he made during commission of the crimes, including threats to kill or harm them and commands that they get on their hands and knees, undress and orally copulate him. These statements were all parts of the crimes themselves (the use of duress in compelling the victims to perform oral copulation and the making of criminal threats) and thus not subject to the corpus delicti rule. Manai also cites the prosecutor's use of his prior testimony in the 1997 French judicial proceeding and the November 2006 trial of this case for purposes of impeaching him on cross-examination. However, he cites no authority holding that prior statements made under oath or impeachment evidence is subject to the corpus delicti rule. Finally, Manai cites the prosecutor's argument that fingerprint and DNA evidence were unnecessary because Manai testified at trial that he was in Claudia's apartment. Manai's testimony at the trial, of course, is not an extrajudicial statement subject to the corpus deliciti rule. Because none of the statements identified by Manai are subject to the corpus delicti rule, we conclude the trial court did not err in failing to instruct the jury on the rule. Since the instruction had no application under the facts of this case, we likewise reject Manai's contention that omission of the instruction infected the trial with such unfairness as to amount to a violation of federal due process. (*McGuire*, *supra*, 502 U.S. at p. 72.)

We conclude the trial court did not err by failing to give a corpus delicti instruction.

E. Failure to Excuse Juror for Cause

Manai argues the trial court erred in denying his motion to excuse Juror No. 12 for cause after the juror reported midtrial that in February or March 2006, he had witnessed a crime similar to Manai's alleged crime, and at least implied that during trial he had tried to obtain outside information about that crime he had witnessed to assure himself that it had not been committed by Manai. The court held an evidentiary hearing and then denied Manai's motion to excuse the juror for cause. We uphold the court's ruling.

1. *Background*

On January 19, 2007, on the second day of testimony and midway through Suzy's cross-examination, Juror No. 12 asked to speak to the court. In a transcribed chambers hearing, the juror explained that sometime in the spring of 2006 ("[s]o similar time frame") at "approximately 2:00 in the morning . . . I heard some screaming across the street. I looked out the window. It appeared to me that someone was being mugged." He quickly exited his apartment and saw "someone approximately my height or taller, walking away from someone who he had . . . mugged, . . . that's the impression I had. [¶] . . . [S]he was sitting on the ground with her back to the wall in an alcove, . . . and he was starting to walk away. . . . [The victim] got scared when I approached her. So I stood back and[] . . . tried to talk to her and calm her down." "[The man] was about five-seven . . . [or] a bit taller" and the incident occurred in San Francisco on "North Point Street between Larkin and Hyde." The police "told me that she had met the gentleman at the bar. I think . . . he offered to take her home, and then, I guess, assaulted her. I don't think he took . . . anything." Because it appeared the man had not stolen anything, the juror thought the incident might have been a sexual assault.

The juror told the court, "The reason I bring this up now, is yesterday afternoon I was starting subconsciously drawing connections between this incident and this case. . . . [¶] . . . [¶] . . . I'm trying to find out the date that this happened, so I can more easily tell myself that there's no possible way this could be the same person. Because Mr. Manai—

[¶] . . . [¶] . . . was about two weeks before, which would have been . . . around the end of February into March. If I can find out exactly when this happened, which I haven't been able to do on my own, if it happened after he was arrested, . . . [o]r if it happened before he arrived in the country, I could easily say it is not him. [¶] . . . [¶] . . . [S]o, I was wondering if we could search the police statements, . . . and find the date, or some way that we can—so that I know."

The court asked the juror if his memory of the incident and the connections he had drawn to the Manai case had interfered with his ability to follow the testimony, and he said, "No, I was still able to follow the testimony, and I believe I will be able to keep that out of my judgment this morning, listening to the testimony. . . . [It] hasn't come back as strong as it was last night or yesterday afternoon. And I think . . . my subconscious has made itself heard, and it shut up." The court asked if he could decide the case based only on the evidence presented at trial, and he said, "I believe I will be able to keep those two instances separate, . . . I will be able to keep those separate from each other and make a judgment based solely on this case."

After the juror was excused from the hearing, defense counsel stated, "I don't know what to do. I'm concerned. I believe him when he says[] . . . that he will try, but it is really hard to keep the subconscious out of you when you are making decisions. Especially something like that[] is going to be lingering for him." He said "I'm not making any motion right now, I'm just letting the court know that's something that I'm concerned about."

The court said the incident did not appear to be prominent in the juror's memory, as he had not mentioned it during voir dire, and it noted that the juror had not seen the North Point Street attacker's face. "[B]ased on what's in front of us, with his assurance that he is not going to let that enter into his decision-making process, I think I don't really have grounds to remove him from the jury. Certainly, he is articulate enough to know that properly he can't consider it for any reason at all. . . . [M]y impression is that the juror has brought it before the court in an overabundance of caution, in wanting to do a

good job as a juror." Nevertheless, the court reserved the issue and indicated it would entertain a motion to remove the juror if either side chose to file one.

On January 30, 2007, Manai filed a formal motion to remove Juror No. 12 for cause. The sole basis asserted for removal was that the juror had committed perjury when he failed to affirmatively respond to a general question asked of the entire panel during voir dire inquiring whether any of the potential jurors had witnessed a crime. If not perjury, Manai argued, the juror's silence was inattention, which was also a ground for removal. At the hearing on the motion, defense counsel characterized Juror No. 12's comments as a request that the court "prove that the defendant in this action didn't commit a totally unrelated crime." Defense counsel argued, "[W]hile he may have, in an attempt to rehabilitation, said that he could be fair and impartial, it seems clear that he is not only biased in the action, but he doesn't understand the proposition of innocent until proven guilty."

The court acknowledged that the jurors were collectively asked during voir dire whether they had ever been witnesses to a crime and that Juror No. 12 had remained silent, a tacit negative response. The court found, however, based on its in camera examination of the juror, that the failure to respond to that general inquiry was "inadvertent and not deliberate." The court observed that, "The true test as to whether a juror should be removed for cause lies in whether or not the . . . juror is biased, and whether that juror has intentionally and deliberately given a false answer to an inquiry that the court proffered to the jurors during the voir dire." The court concluded there had been no showing of bias requiring the juror's removal. Manai renewed his claim in a postverdict motion for a new trial. The court denied the motion.

2. *Legal Standards*

A criminal defendant has a federal and state constitutional right to a trial by impartial jurors. (*In re Hitchings* (1993) 6 Cal.4th 97, 110.) "A juror who conceals relevant facts or gives false answers during the voir dire examination . . . undermines the

jury selection process and commits misconduct."[29] (*Id.* at p. 111.) Further, a juror who considers material extraneous to the record also commits misconduct.[30] (*People v. Williams* (2006) 40 Cal.4th 287, 333.)

"On appeal from a ruling denying a new trial motion based on juror misconduct, we defer to the trial court's factual findings if supported by substantial evidence, and exercise our independent judgment on the issue of whether prejudice arose from the misconduct . . . . (*People v. Nesler*[(1997)] 16 Cal.4th [561,] 582 & fn. 5; see *People v. Ault* (2004) 33 Cal.4th 1250, 1263–1264.)" (*People v. Cissna* (2010) 182 Cal.App.4th 1105, 1117.)

3. *Juror Misconduct and Prejudice*

Based on its own interrogation of the juror, including its assessment of the juror's demeanor, the trial court found that the juror had not committed perjury and that his failure to respond to the court's general question to the panel was inadvertent. Defense counsel himself did not challenge the juror's credibility saying "He appears to be a very honest gentleman to me, and I really believe that he is going to try to do what he says." Substantial evidence supports the trial court's finding that no prejudicial misconduct occurred.

Even if we were to find misconduct in the juror's inadvertent failure to affirmatively respond to the court's question, we would concur with the court's conclusion that no bias or prejudice had been shown. "Misconduct by a juror[] . . . usually raises a rebuttable 'presumption' of prejudice. [Citations.] . . . [¶] . . . Any

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[29] It is an unsettled question of law whether the concealment or false statements must be intentional and not inadvertent to constitute misconduct. (*People v. Carter* (2005) 36 Cal.4th 1114, 1208, fn. 47.)

[30] In his briefing, Manai argues that the juror committed misconduct in obtaining evidence outside the courtroom. The record is unclear whether Juror No. 12 actually sought outside information on the crime he witnessed prior to the in camera hearing or whether he simply contemplated doing so. His relevant statement was: "I'm trying to find out the date that this happened, so I can more easily tell myself that there's no possible way this could be the same person." Manai did not seek discharge of the juror on this basis in the trial court, and he has waived any claim on this basis here.

presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant. [Citations.]" (*In re Hamilton* (1999) 20 Cal.4th 273, 295–296.) The prejudice standard "is a pragmatic one, mindful of the 'day-to-day realities of courtroom life' [citation] and of society's strong competing interest in the stability of criminal verdicts [citations]. It is 'virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.' [Citation.] Moreover, the jury is a 'fundamentally human' institution; the unavoidable fact that jurors bring diverse backgrounds, philosophies, and personalities into the jury room is both the strength and the weakness of the institution. [Citation.] '[T]he criminal justice system must not be rendered impotent in quest of an ever-elusive perfection. . . . [Jurors] are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias.' [Citation.]" (*Id.* at p. 296.)

Any presumption of prejudice that might have arisen was more than adequately rebutted by evidence that Juror No. 12 held no actual bias against Manai. Juror No. 12 voluntarily came forward, described the crime he had witnessed, and expressed his own independent concern that the information might be subconsciously prejudicing him against Manai. These objective circumstances strongly suggest the juror did not intentionally conceal his memory of the incident during voir dire, and that he had a sincere commitment to following the court's instructions and performing his duties in an unbiased manner. When the court told him he needed to set aside the prior incident and decide the case solely based on the evidence presented at trial without obtaining outside information, he readily agreed and assured the court that he could do so. Even defense counsel acknowledged that the juror seemed honest and sincere.

Manai suggests it was not reasonably possible for the juror to set aside his memory of the incident given the incident's similarity to Manai's alleged crime. In our view, there was nothing extraordinary about the crime Juror No. 12 witnessed or its similarity

to the charged crimes. Jurors routinely are asked to set aside similar experiences and, through intellectual self-discipline and a commitment to a fair judicial process, decide the case according to the evidence presented at trial and the court's instructions. In light of the court's credibility determinations, the objective circumstances in which the report came to light (i.e., through the juror's own conscientious self-reporting), and the juror's lack of any information actually linking Manai to the crime he witnessed, we conclude no evidence of prejudice was presented, and any inference of prejudice was more than adequately rebutted. The record does not establish any substantial likelihood that Juror No. 12 was biased and his removal from the jury was required.

F. Restitution and Parole Revocation Fines and Court Security Fees

As part of Manai's sentence, the trial court imposed cumulative restitution fines of $33,000 (§ 1202.4, subd. (b)), imposed and suspended parole revocation fines of $33,000 (§ 1202.45), and imposed a court security fee of $20 (§ 1465.8, as added by Stats. 2003, ch. 159, § 25.)

Manai argues, and the People concede, that the maximum total restitution fine that could have been imposed in his case was $10,000. (§ 1202.4, subd. (b)(1); *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1534.) The parole revocation fine is automatically set at an equal amount. (§ 1202.45.) The People argue, and Manai concedes, that a court security fee of $20 should have been imposed not just once for the entire case but once for each of the seven counts of which Manai was convicted. We agree with both of these conceded points and will reduce the restitution fines and the corresponding parole revocation fines to no more than $10,000 each and increase the court security fee to $140.

On the specific amount of the restitution and corresponding parole revocation fines, Manai argues the case should be remanded to the trial court so that it can exercise its discretion to set the fines at a level between the statutory minimum of $200 and the statutory maximum of $10,000. The People argue remand is unnecessary because the court clearly intended to impose the maximum fines possible. The People ask us to directly modify the judgment by reducing the restitution and parole revocation fines to

$10,000 each, as other appellate courts have done. (See, e.g., *People v. Blackburn, supra,* 72 Cal.App.4th at p. 1534.)

The amount of a felony restitution fine is "set at the discretion of the court and commensurate with the seriousness of the offense." (§ 1202.4, subd. (b)(1).) "In setting the amount of the fine . . . , the court *shall* consider any relevant factors, including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in the crime. Those losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime." (§ 1202.4, subd. (d), italics added.) "[T]he court *may* determine the amount of the fine as the product of two hundred dollars ($200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." (§ 1202.4, subd. (b)(2), italics added.)

Here, the trial court used the formula set forth in section 1202.4, subdivision (b)(2), separately calculating the fine due on the determinate sentence ($200 times five counts times five years, totaling $5,000) and the indeterminate sentence ($200 times two counts times 70 years, totaling $28,000).[31] Because the trial court initially opted to apply the statutory formula and impliedly found the resulting amount was

[31] The presentence report of the probation officer, which Manai cites in support of his request for a remand, recommended a restitution fine of only $1,400. The report did not explain this recommendation, but it appears that the probation officer multiplied $200 by the seven counts on which Manai was convicted and did not go on to multiply that result by the number of years in Manai's sentence. We can infer this was simple error rather than a recommendation of leniency because, with respect to Manai's term of imprisonment, the probation officer cited four aggravating factors and no mitigation factors.

appropriate in light of the relevant factors set forth in section 1202.4, subdivision (d),[32] we may safely assume that on remand it would apply the same statutory formula and conclude that the statutory maximum of $10,000 was not excessive. That is, we may reasonably conclude on these facts that the trial court on remand would impose a fine of not less than $10,000. A remand is therefore unnecessary.

III. DISPOSITION

The judgment is modified to reduce the restitution fines imposed pursuant to section 1202.4, subdivision (b)(1) to a total of $10,000, to reduce the parole revocation fines imposed and suspended pursuant to section 1202.45 to a total of $10,000, and to increase the court security fee imposed pursuant to section 1465.8 to a total of $140. In all other respects, the judgment is affirmed. Upon the issuance of the remittitur, the trial court shall correct the abstract of judgment and send a corrected copy to the California Department of Corrections and Rehabilitation.

_____
Bruiniers, J.

We concur:

_____
Jones, P. J.

_____
Simons, J.

[32] In setting a term of imprisonment for Manai, the court chose upper terms for the principal offenses, citing the viciousness of the crime, the seriousness of the offense, and Manai's repeated acts of violence as substantial aggravating factors. The court expressly found that Manai's cited mitigating factors "pale before those circumstances in aggravation."